No. 80-301

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WAYNE HAVEN NURSING HOME, VALLEY NURSING HOME, PINE REST NURSING HOME, DUNROVEN NURSING HOME, ALLENDALE NURSING HOME, WELLINGTON HALL NURSING HOME and WOODCLIFF LAKE MANOR NURSING HOME,

Appellants,

v.

JOANNE E. FINLEY, M.D., State Commissioner of Health, the HEALTH CARE ADMINISTRATION BOARD and PUBLIC ADVOCATE OF NEW JERSEY, NEW JERSEY ASSOCIATION OF HEALTH CARE FACILITIES,

Appellees.

On Appeal from the Supreme Court of New Jersey

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Questions Presented

1. Whether a New Jersey administrative regulation which mandates that private nursing homes accept and treat a "reasonable number" of "medically indigent" patients and prohibits transfers of patients when their private funds are exhausted, as a precondition to licensure, is a valid exercise of the police power or a "taking" of private property for a public use within the meaning of the Fifth Amendment?

2. If the New Jersey administrative regulation is a "taking" under the Fifth Amendment, can the State avoid the necessity of providing just compensation by (a) authorizing and encouraging the nursing homes to seek recompense from other private paying patients and (b) forcing the private nursing homes to participate in the voluntary State Medicaid program?

3. Do administrative regulations which impose upon a renewal licensee the obligation to make available a "reasonable number of beds" to a "reasonable number of indigents" and that the licensee "shall be entitled to a reasonable rate for Medicaid patients" suffer from unconstitutional vagueness and ambiguity by providing no effective limitations on the number of indigents and the method and amount of reimbursement so they cannot be understood by persons of common intelligence?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
CONCLUSION	6

Cases Cited

Beal v. Doe, 432 U.S. 438 (1977)	4
Blue Chip Stamps v. Manor Drugstores, 421 U.S. 723 (1975)	4
Briarcliff Haven, Inc. v. Dept. of Human Resources, 403 F. Supp. 1355 (N.D. Ga. 1975)	3
Minnesota Assn. of Health Care Facilities v. Minnesota Dept. of Public Welfare, 602 F.2d 150 (8th Cir. 1979)	6
National Union of Hospital & Health Care Employees v. Carey, 557 F.2d 278 (2d Cir. 1976)	6
New York Dept. of Social Services v. Dublino, 413 U.S. 405 (1973)	5
Rush v. Parham, 440 F. Supp. 383 (N.D. Ga. 1977), app. pending sub nom Rush v. Poythress, No. 77-2743 (5th Cir.)	3
Townsend v. Swank, 402 U.S. 282	5

United States Constitution Cited

Fifth Amendment	i

PAGE

Statute Cited

42 U.S.C.:

Sec. 23[1] 2

Sec. 1396a(a)(23) 2, 3

Sec. 1396a-(a)(17) 4

Regulation Cited

42 C.F.R.:

Sec. 447.204 3

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Both the New Jersey Commissioner of Health and the Department of the Public Advocate have filed motions to dismiss in response to the Appellant's Jurisdictional Statement. This Answering Brief is devoted to the substantial federal question at the core of this case: May

the States compel private nursing homes to participate in the State Medicaid program in order to receive some compensation for a taking?

At least the Public Advocate's argument has the intellectual honesty to admit that the states have ascribed this power into themselves without any basis in federal law:

> Just compensation is readily available to Appellants. If they choose not to take it, they cannot be heard to complain.[1]

The Commissioner of Health, however, has sought to convince this Court that federal law supports New Jersey's confiscatory plan. Nothing could be further from the truth.

Appellees have distorted the meaning of 42 U.S.C. 1396 a (a)(23), the "free choice of provider provision" by artfully excerpting the statute. The Commissioner of Health quotes a portion of that provision, but deletes the phrase which clearly underscores the voluntary character of the Act. The Commissioner's brief states:

> Any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, . . . or person, qualified to perform the service or services required. . . .[2]

The very next phrase of §23, which was omitted, reads, who "undertakes to provide him such services." "To undertake" suggests an action done of one's own volition. If Congress contemplated compelled participation, this last

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[1] Brief for Appellee Department of Public Advocate, at p. 7.

[2] Brief for Appellee Commissioner of Health, at pp. 10-11.

phrase would not have been necessary. 42 C.F.R. §447.204 requires that payments by the states be high enough to "enlist" a sufficient number of providers. Again, "enlist" clearly implies voluntariness. If the regulation had any other meaning, there would be no reason for mandating that payments be made attractive.

Appellees' reliance on *Briarcliff Haven, Inc.* v. *Dept. of Human Resources,* 403 F. Supp. 1355 (N.D. Georgia 1975) is misplaced. *Briarcliff* holds that the "free choice of provider" requirement (42 U.S.C. §1396a(a)(23)) is designed "to assure each medicaid recipient a free choice among qualified providers." (403 F.Supp. at 1362). Appellees use this language to suggest that a medicaid recipient should be able to compel any nursing home to take him in, as long as it is qualified (i.e. meets certain medical standards). Yet, the language on which Appellees rely presupposes that the "qualified" homes from which a medicaid recipient may choose are voluntary participants. Briarcliff Haven Nursing Home voluntarily joined the State Medicaid program. Nowhere in the case is there a suggestion that the state can compel participation. In fact, the court notes that the "provider agreement is best viewed as a business contract between the state and each provider by which their participation in the Georgia Medicaid Program is defined." (403 F.Supp. at 1358). This contractual arrangement reflects the voluntary nature of Medicaid.

Appellees cite *Rush* v. *Parham,* 440 F. Supp. 383 (N.D. Ga. 1977), app. pending *sub nom Rush* v. *Poythress,* No. 77-2743 (5th Cir.) to support the proposition that a state can require a hospital or nursing home to accept Medicaid patients. In *Rush,* the hospital, a voluntary Medicaid participant, refused transsexual surgery for a Medicaid recipient whose physician deemed the surgery phy-

chologically necessary. The issue was not compelled participation, but compelled procedures imposed on voluntary participants. In fact, the Court noted that the "programs of Medicaid and Medicare were shaped from a decision in favor of private enterprise and against state or socialized medicine as it is practiced in other countries." (440 F.Supp. at 389).

In *Beal* v. *Doe,* 432 U.S. 438 (1977), this Court held that a state participating in the Medicaid Program is not required to fund the cost of non-therapeutic abortions. The Court noted that a participating state is afforded great latitude in molding its medical assistance program. Appellees use this language to support their proposition, when in fact it was intended to support the proposition (as in *Rush, supra*) that states can compel procedures, not participation.

Beal is based on 42 *U.S.C.* 1396a-(a)(17), which requires each state to establish "reasonable standards . . . for determining . . . the *extent* of medical assistance under the plan which are consistent with the objectives of [Title XIX]." (Emphasis added.) Does "extent" refer to the breadth of services which a participating hospital must provide or to the lengths to which a state may go in foisting its own economic burden on private institutions? Clearly the case law supports only the former proposition.

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drugstores,* 421 U.S. 723, 756 (1975) (Powell, J., concurring). Here, the statute (Title XIX) clearly deals in terms of the types of services which participants must provide. See *Beal, supra,* 432 U.S. at 444 ("The statute [Title XIX] is cast in terms that require participating states to provide financial assistance with respect to five broad categories of medical treatment.")

Finally, Appellee cites *New York Dept. of Social Services* v. *Dublino,* 413 U.S. 405 (1973) to support the claim that "any intention by Congress to supercede the exercise of state power must be expressly stated".[3] The issue in *Dublino* was whether the Social Security Act bars a state from independently requiring individuals to accept employment in order to receive federally-funded aid to families with dependent children. *Dublino* presents the following scenario: in 1967, when the federal work program was passed, 21 states already had their own welfare work requirements as a condition of AFDC eligibility, so, as the Court noted, if Congress had intended to pre-empt state plans, such intention probably would have been expressed in unambiguous terms. In the instant case, on the other hand, Appellees cannot point to a single state which required nursing homes to accept indigents prior to the passage of the federal act.

Furthermore, the *Dublino* Court found that the federal program was limited in scope, that it was a "partial program", not meant to be "all embracing", leading it to conclude that Congress must have intended that states set up their own programs. (413 U.S. at 418 and 419). In fact, to conclude to the contrary would be to interpret a federal statute to "negate its own purpose." (413 U.S. at 420). *Cf. Townsend* v. *Swank,* 402 U.S. 282, (State AFDC eligibility standards which exclude persons eligible under the federal standards violate the Supremacy Clause.)

Dublino also requires that the construction of the statute advanced by the federal agency charged with its execution should be followed unless there are compelling reasons that it is wrong. But HEW was unaware of the Health Care Administration Board's interpretation of the

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[3] Brief for Appellee Commissioner of Health, at p. 12.

statute, since it originated from the State Department of Health, and not from State Medicaid Agency (Department of Human Resources). Appellees argue that in the absence of any affirmative persuasive showing that the federal agency's interpretation is incorrect, that interpretation must stand. Appellees ignore the clear decisional law to the contrary. *See, National Union of Hospital & Health Care Employees* v. *Carey,* 557 F.2d 278, 282 (2d Cir. 1976) (Appellants "have the choice of either making their operation more efficient or not accepting Medicaid patients"); *Minnesota Assn. of Health Care Facilities* v. *Minnesota Dept. of Public Welfare,* 602 F.2d 150, 154 (8th Cir. 1979) ("Participation by a nursing home as a provider of health care services to Medicaid recipients is voluntary.")

CONCLUSION

For these reasons in addition to those set forth in the Jurisdictional Statement, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

ADRIAN M. FOLEY, JR.,
Counsel for Appellants.

Dated: October 17, 1980